

**IN THE NATIONAL COMPANY LAW TRIBUNAL,**

**MUMBAI BENCH-I**

**C.P (IB) No. 4217/MB/2019**

Under Section 7 of the Insolvency & Bankruptcy Code,  
2016

In the matter of,

**1. Amit Rajpal**

**2. Ms. Sheetal N Samant**

Both Residing at:

Flat No. A-44, 43<sup>rd</sup> Level, Wing A, Ahuja Towers, Raja  
Bhau Anant Desai Marg, Prabhadevi, Mumbai- 400025.

**...Financial Creditor**

Versus

**Shree Ahuja Properties & Realtors Private Limited**

**(CIN: U45400MH2007PTC172860)**

Ground Floor, Rajpipla, Opp. Standard Chartered Bank,  
Linking Road, Santacruz (West), Mumbai- 400054.

**... Corporate Debtor**

**Order Pronounced on: 30.08.2022**

***Coram:***

Hon'ble Member (Judicial) : Justice P. N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

***Appearances:***

For the Applicant : Mr. Ankit Lohia, Advocate.

For the Corporate Debtor : None

**ORDER**

*Per: Justice P.N. Deshmukh, Member (Judicial)*

1. The present Company Petition is filed by **Mr. Amit Rajpal & Mrs. Sheetal Nityanand Samant**, (hereinafter referred to as the “Financial Creditor”) under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking initiation of Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) against **Shree Ahuja Properties and Realtors Private Limited** (hereinafter referred to as the “Corporate Debtor”).
2. The Corporate Debtor is company incorporated under the Companies Act, 1956 and has its registered office at Ground Floor, Rajpipla, Opp. Standard Chartered Bank, Linking Road, Santacruz (West), Mumbai-400054. Its Company Identification Number (CIN) is U45400MH2007PTC172860. Therefore, this Bench has the jurisdiction to entertain this Petition.
3. The total principal amount of debt claimed is Rs.1,09,22,500/- (Rupees One Crore Nine Lakh Twenty-Two Thousand Five Hundred Only), further interest @9% from 01.10.2014 till 31.08.2017 being Rs.27,81,960/-, interest @18% from 01.09.2017 till 15.10.2017 being Rs.2,45,756/- and interest @21% from 16.10.2017 till 10.04.2019 being Rs.34,40,587/-. Thus, the **total amount of debt claims** amounts to Rs.1,73,90,803/- (Rupees One Crore Seventy-Three Lakh Ninety Thousand Eight Hundred and Three Rupees Only), the **date of default** being **02.09.2016**.

**Submissions made by the Ld. Counsel of the Financial Creditor by the way of Petition:**

4. It is the case of the Financial Creditor that the Financial Creditor and Corporate Debtor entered into an agreement for sale on 01.10.2014, as the “Purchaser” and the “Developer” respectively. Pursuant to the same, the Financial Creditor has become the owner of Flat No. A-44, 43rd Level, Wing A, Ahuja Towers, Raja Bhau Anant Desai Marg, Prabhadevi, Mumbai 400 025 (“Said Flat”). Under the said Agreement, Financial Creditor has paid a total consideration of Rs.23,00,00,000/- (Rupees Twenty-Three Crores Only) Corporate Debtor.
5. The Financial Creditor paid the following amounts to the Corporate Debtor in pursuance of the agreement:

Sr. No.	Date	Cheque No.	Amount (In Rs.)
1.	01.10.2014	137629	4,60,00,000/-
2.	01.10.2014	LP BDR No. 017544	1,15,30,000/-
3.	04.10.2014	206455	6,77,28,740/-
4.	13.10.2014	206456	15,42,27,125/-
5.	24.10.2014	233902	65,75,107/-
6.	20.10.2015	206461	1,03,91,862/-
7.	02.11.2015	493114	5,00,000/-
8.	20.11.2015	002118	1,09,22,500/-

6. The Flat owners of the aforesaid building i.e., “Ahuja Towers” had formed a co-operative society by the name “Ahuja Tower Co-Operative Housing Society Ltd” which was registered under Registration No. MUM/SRA/HSG/T.C/12692/2016 on 02.09.2016.

7. After the formation of the society, the committee member of the said society was demanding for payments of the corpus fund amount from the Financial Creditor for the said flat. Thereafter, the said society, issued an intimation notice on 19.07.2018 to the Corporate Debtor and copy of it to Financial Creditor *inter alia* stating that, an amount of Rs.1,09,22,500/- (Rupees One Crore Nine Lakhs Twenty-Two Thousands Five Hundred Only) is outstanding towards Corpus Fund payable by Financial Creditor for the said flat. Also, in the event of non-payment of the said outstanding Corpus Fund amount before 31.07.2018, the said society, will proceed to recover the Corpus Fund amount with interest thereon @ 9% p.a. from the date of agreement for sale for the said flat and if the outstanding Corpus Fund amount was not received before the set date then the rate of interest thereon will increase upto 18% to 21% p.a. retrospectively.
8. The Financial Creditor submits that they were constrained to address a legal notice to the Corporate Debtor on 22.08.2018, having breached the terms and conditions of agreement to sale, which is entered into by and between the parties and further failed and defaulted for non-payment of the said corpus fund amounts to the said society. The said notice was duly received by the Corporate Debtor on 22.08.2018.

**Submissions made by the Corporate Debtor by way of Reply:**

9. The Financial Creditors have filed Consumer Complaint No. 30 of 2019 (hereinafter referred to as “Consumer Complaint”) before the National Consumer Disputes Redressal Commission, New Delhi (hereinafter referred to as “NCDRC”) towards the alleged claim and have claimed as follows:

- (i) Rs.70,75,107/- along with interest @ 9% till filing of Consumer Complaint with further interest @ 18% till realization of payment towards refund of the amount paid to the Corporate Debtor.
  - (ii) Rs. 1,79,97,607/- along with interest @ 18% till realization of payment towards mental agony and hardship suffered by the Financial Creditors.
  - (iii) Rs. 1,09,22,500/- along with the interest @ 21 % from the date of Agreement for Sale on 01.10.2014 till realization of payment towards Corpus Fund.
10. The Financial Creditor failed to disclose the filing and pendency of the said consumer complaint to the Tribunal. The Financial Creditor has filed this Petition post institution of the said Consumer Complaint before the NCDRC. Hence, the Financial Creditor has approached this Tribunal with unclean hands, therefore the said application is liable to be dismissed.
  11. The Corporate Debtor has relied upon the judgement laid down by the Hon'ble Supreme Court in the case of Mobilox Innovations Pvt. Ltd. v/s Kirusa Software (P) Limited -2017 (SCC Online SC 1154), stating that the ratio of the said case applies to the present facts, since the Consumer Complaint is already pending before the NCDRC, the present Application deserves to be dismissed.
  12. The Financial Creditors were aware that they are required to pay the corpus fund of Rs. 1,09,22,500/- (Rupees One Crore Nine Lakh Twenty-Two Thousand Five Hundred Only) in the corpus fund account as agreed in the said agreement.
  13. The Corporate Debtor by letter dated 27.09.2015 made a demand for amounts agreed under the said agreement to the Financial Creditors which includes a demand of Rs. 1,09,22,500/- (Rupees One Crore Nine

Lakh Twenty-Two Thousand Five Hundred Only) with an instruction to issue the cheque of said amount of Rs. 1,09,22,500/- (Rupees One Crore Nine Lakh Twenty-Two Thousand Five Hundred Only) in favor of "Shree Ahuja Properties & Realtors Pvt. Ltd-Corpus Fund A/C"). The copy of the said letter dated 27.09.2015 is annexed as Exhibit-A.

14. In accordance to the terms of the agreement for sale executed between respective flat purchasers and the Corporate Debtor, the Corporate Debtor is required to collect Corpus of Rs.1 Cr. and above (approx.) which differs between various flat purchasers and is ascertained according to the carpet area of the flats. The Corporate Debtor is required to submit the said Corpus amount collected from flat purchasers to the Society.
15. The Corporate Debtor has received Corpus fund from various flat purchasers, except for the Financial Creditors and few other flat purchasers. The amount receivable towards the corpus fund was deposited by the flat purchasers in the Cosmos Bank, Vile Parle branch in the Corpus Account of the Corporate Debtor. The Corporate Debtor has transferred the entire amount from the said corpus account of the Corporate Debtor to the Bank Account of the said Society at Saraswat Co-op. Bank Ltd, Prabhadevi Branch, on various dates between December 2016 to March 2017. The Corporate Debtor has in aggregate collected Rs.46,81,00,000/- (Rupees Forty-Six Crore Eighty-One Lakh Only) from the flat purchaser/ members and deposited in the Saraswat Co-Op. Bank ltd of the Society. The Corpus fund was maintained in the form of fixed Deposit receipts and these Fixed Deposit receipts were handed over to the said Society. The said Society has acknowledged its receipts. The list of the details of the fixed deposit receipts was also handed over to the said Society.

16. In case of the Financial Creditors they have deposited the amount towards Corpus fund in the loan account of the Corporate Debtor but failed to deposit in the Corpus Fund account. Since the amounts were deposited in the loan account, the Corporate Debtor could not withdraw from the said account and hand over the same to the said Society.
17. The Corporate Debtor submits that, in the midst of reconciliation of accounts with the said Society, the Corporate Debtor realized that few of the flat purchasers were required to pay Rs.2,57,67,915/ (Rupees Two Crore Fifty-Seven Lakh Sixty-Seven Thousand Nine Hundred Fifteen only) to the Corporate Debtor. There was an understanding between the Corporate Debtor & the said Society that the said amount of Rs.2,57,67,915/-(Rupees Two Crore Fifty-Seven Lakh Sixty-Seven Thousand Nine Hundred Fifteen only) shall be adjusted towards the corpus fund of Mr. Ashwinbhai G. Gohil & another for Flat No. B-44 and the Financial Creditors for Flat No. A-44. The Corporate Debtor has addressed letter dated 12.09.2018 which is received and acknowledge by the said Society and the said fact are set out in paragraph No.5 of the said letter. The copy of the said letter dated 12.09.2018 along with its annexure is annexed as "Exhibit-B" to the reply.
18. The Corporate Debtor further submits that the only ground on which the present Application appears to have been filed by the Financial Creditors is that the outstanding corpus fund amount for the said flat is not paid to the said Society and therefore they are unable to use the common amenities in the said Society. The Financial Creditors themselves have failed to deposit it in the corpus account informed to them by the Corporate Debtor. However, the Corporate Debtor has intimated the said Society by its letter dated 12.09.2018 to adjust the amount payable

by the said Society to Corporate Debtor towards corpus fund of Flat No. B-44 and the said Flat of the Financial Creditors being Flat No. A-44.

19. The accounts were being reconciled between the Corporate Debtor and the said Society and in such situation, the said Society should not have raised the alleged demand notice dated 19.07.2018 to the Corporate Debtor. However, the Corporate Debtor by letter dated 12.09.2018 has informed the said Society to adjust the amount receivable from some flat purchaser towards corpus fund of Flat A-44 and said flat B-44 and thereby the Financial Creditors cannot demand the amounts claimed in this Application as alleged by the Financial Creditors and thereby this Application is not maintainable and liable to be dismissed.

**Findings:**

20. We have heard the submissions of Applicant as well as the Corporate Debtor and perused the records.
21. As per the given facts in the present matter, it is clearly established that the Financial Creditors are the allottees under a real estate project and thus reference needs to be made to Section 7 of the Code.
22. The Applicant has failed to prove the majority as enriched under Section 7(1) of the Insolvency and Bankruptcy Code, 2016 which states:

***7. Initiation of corporate insolvency resolution process by financial creditor.***

.....

*[Provided that for the financial creditors, referred to in clauses (a) and (b) of subsection (6A) of section 21, an application for initiation*

*corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:*

.....”

For the want of fulfilment of the criteria set by the Insolvency and Bankruptcy Code, 2016 in matter of Real Estate projects, this Petition cannot be allowed as it is filed only by a single allottee and cannot be considered as per the provision laid down in Section 7(1) of the Code. Under the Code, a minimum of 100 people or 10% of the total allottee must be there to initiate a proceeding in IB Code.

23. Thus, applying the given provision of law to the present facts, we have no material to conclude that the Financial Creditors amount to minimum 10 percent. Accordingly, the Financial Creditors are not eligible to file a Petition before this forum.
24. We note that the Corporate Debtor has relied upon the judgement laid down by the Hon'ble Supreme Court in the case of Mobilox Innovations Pvt. Ltd. v/s Kirusa Software (P) Limited -2017 (SCC Online SC 1154), stating that the ratio of the said case applies to the present facts. However, the above case law throws light on Section 9 of the Code whereas the present Petition has been filed under Section 7. Hence, the above judgement is wrongly relied upon.
25. We also note that the present transaction was in pursuance of the sale agreement. There was no other agreement formed between the parties for amount claimed in default/amount transferred towards corpus fund, hence the given transaction of transfer of corpus funds into the loan

account would not qualify as a financial debt as per the definition laid down in Section 5(8).

26. Thus, Applicant failed to qualify the threshold prescribed in the proviso laid down under section 7 (1). Therefore, this Petition is liable to be rejected.

27. It is, accordingly, hereby ordered as follows: -

The petition bearing **CP (IB) 4217/MB/2019** filed by **Mr. Amit Rajpal and Mrs. Sheetal Nityanand Samant**, the Financial Creditors, under section 7 of the IBC read with rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Shree Ahuja Properties and Realtors Private is rejected.**

Sd/-

**SHYAM BABU GAUTAM**  
**Member (Technical)**

30.08.2022  
DSB

Sd/-

**JUSTICE P.N. DESHMUKH**  
**Member (Judicial)**